Federal Court of Appeal | Cour d'appel fédérale

Date: 20170123

Docket: A-435-15

Citation: 2017 FCA 15

CORAM: **TRUDEL J.A.**
BOIVIN J.A.
DE MONTIGNY J.A.

BETWEEN:

PROPHET RIVER FIRST NATION AND
WEST MOBERLY FIRST NATIONS

Appellants

and

ATTORNEY GENERAL OF CANADA,
MINISTER OF THE ENVIRONMENT,
MINISTER OF FISHERIES AND OCEANS,
MINISTER OF TRANSPORT, AND
BRITISH COLUMBIA HYDRO AND POWER AUTHORITY

Respondents

Heard at Montréal, Quebec, on September 12, 2016.

Judgment delivered at Ottawa, Ontario, on January 23, 2017.

REASONS FOR JUDGMENT BY: BOIVIN J.A.

CONCURRED IN BY: TRUDEL J.A.
DE MONTIGNY J.A.

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REASONS FOR JUDGMENT

BOIVIN J.A.

I. INTRODUCTION

[1] This appeal is made in the context of the building of a hydroelectric dam on the Peace River in Northeastern British Columbia. The central question raised by this appeal relates to the scope of the decision-making authority of the Governor in Council (GIC) when it must be determined whether likely significant adverse environmental effects from a project, such as the hydroelectric dam project at issue, are "justified in the circumstances" in accordance with subsection 52(4) of the *Canadian Environmental Assessment Act, 2012*, S.C. 2012, c. 19, s. 52 (CEAA 2012). Specifically, the Court must determine whether the GIC, in circumstances where the designated project has significant adverse environmental effects and adverse effect on lands covered by a treaty, is required to determine if such effects constitute an infringement to the treaty rights and, if so, whether such effects must be justified according to the test set out in *R. v. Sparrow*, [1990] 1 S.C.R. 1075, [1990] S.C.J. No. 49 (QL) [*Sparrow*]. It bears noting that in this appeal, there is no challenge to the adequacy of the consultations undertaken by the respondents.

[2] Having considered the environmental assessment (EA) process undertaken in the case at bar – including the evidence provided by the appellants, the information obtained by the JRP, and the consideration of Aboriginal rights and interests by the JRP – as well as the GIC's powers under subsection 52(4) of CEAA 2012, I would dismiss the appeal with costs.

II. BACKGROUND

[3] The treaty at issue, Treaty 8, was signed on June 21, 1899. It covers most of Northern Alberta, Northwestern Saskatchewan, Northeastern British Columbia, and the Southwest portion

of the Northwest Territories. Treaty 8 expressly grants all treaty beneficiaries hunting, trapping and fishing rights within the treaty territory. Existing Treaty 8 rights are recognized and affirmed within the meaning of subsection 35(1) of the *Constitution Act, 1982*, being Schedule B to the *Canada Act, 1982* (U.K.), 1982, c. 11 (*Constitution Act, 1982*).

[4] The Prophet River First Nation and the West Moberly First Nations (together, the appellants) are British Columbia Treaty 8 First Nations. The respondent British Columbia Hydro and Power Authority (BC Hydro) is a British Columbia provincial Crown corporation and the project proponent under the CEAA 2012. BC Hydro purports to take up Treaty 8 lands for the Site C Clean Energy Project (Site C Project), a hydroelectric dam on the Peace River. The other respondents are the Attorney General of Canada, the Minister of the Environment, the Minister of Fisheries and Oceans and the Minister of Transport (the Crown).

[5] The appellants appeal a decision of a Federal Court Judge (the Judge) denying their application for judicial review of the GIC's decision (2015 FC 1030). The GIC's decision at issue deemed that although the Site C Project would likely cause significant adverse environmental effects – including adverse effects on the Aboriginal peoples use of lands and resources for traditional purposes – these effects were justified in the circumstances pursuant to subsection 52(4) of the CEAA 2012.

[6] The application for judicial review at issue (T-2292-14 reported as 2015 FC 1030) was heard consecutively with another application for judicial review in *Peace Valley Landowner Association v. Attorney General of Canada and the Minister of the Environment, and British*

Columbia Hydro and Power Authority (T-2300-14). The latter resulted in a separate decision (2015 FC 1027) that is not subject to this appeal.

III. FACTS

[7] The Site C Project is planned to be the third dam and hydroelectric generating station on the Peace River. Its projected construction includes, amongst other infrastructure, an 83-kilometre long reservoir flooding approximately 5550 hectares of land and resulting in a total reservoir surface area of approximately 9330 hectares. Up to 70% of the Peace River Valley has already been flooded by previous hydroelectric developments. It is not disputed that the Site C Project would flood approximately half of the remaining 30% of the Peace River Valley.

[8] The Site C Project was subject to review for environmental effects under both the federal CEAA 2012 and the provincial legislation in British Columbia (*Environmental Assessment Act*, S.B.C. 2002, c. 43 (BC *Environmental Assessment Act*)). The governments of Canada and British Columbia entered into an agreement for a harmonized EA process (amended to reflect the entry into law of the CEAA 2012, replacing previously applicable federal legislation), including the establishment of a Joint Review Panel (JRP) to avoid unnecessary delays and duplication. The JRP's mandate flowed from the CEAA 2012, the BC *Environmental Assessment Act* and the JRP Agreement and Terms of Reference (Appeal Book Compendium, Vol. 1, Part 2, Tab E.62, pp. 3351-3360).

[9] Pursuant to the agreement for a harmonized EA process, the EA provided for three stages of assessment: the Pre-Panel Stage, the JRP Stage and the Post-Panel Stage. The Pre-Panel Stage

involved the production of Environmental Impact Statement (EIS) Guidelines and a determination of when the EIS, prepared by the project proponent, was ready for review by the JRP. The JRP Stage included a determination of the sufficiency of the EIS, in addition to public consultations, including from Aboriginal groups, and the production of a report in accordance with the CEAA 2012 and the JRP Agreement and Terms of Reference. At the Post-Panel Stage, the federal and provincial decision-makers received the JRP's Report and other documents from the Canadian Environmental Agency.

[10] The JRP Agreement and Terms of Reference limited the scope of the JRP's conclusions and recommendations regarding the effect of the Site C Project on Aboriginal peoples and Aboriginal rights. It also expressly stated that the JRP will not draw conclusions as to the nature, scope or strength of asserted Aboriginal and treaty rights or whether those rights have been infringed:

> 2.5 The Joint Review Panel will not make any conclusions or recommendations as to:
>
> a) the nature and scope of asserted Aboriginal rights or the strength of those asserted rights;
>
> b) the scope of the Crown's duty to consult Aboriginal Groups;
>
> c) whether the Crown has met its duty to consult Aboriginal Groups and, where appropriate, accommodate their interests in respect of the potential adverse effects of the Project on asserted or established Aboriginal rights or treaty rights;
>
> d) whether the Project is an infringement of Treaty No. 8; and
>
> e) any matter of treaty interpretation.
>
> 2.6 The Joint Review Panel will describe any asserted or established Aboriginal rights and Treaty rights that are raised during the Joint Review Panel Stage

> and any impacts on those rights as articulated by those Aboriginal Groups in the Joint Review Panel Report
>
> (Appeal Book Compendium, Vol. 1, Part 2, Tab E.62, p. 3363).

[11] The consultation and accommodation process with Aboriginal groups was integrated into the EA from the outset and was set at the deep end of the consultation spectrum. This process engaged Aboriginal groups in on-going discussions, which notably included opportunities for Aboriginal groups to provide feedback on a draft consultation and accommodation report.

[12] On the basis of the EIS and other information submitted by BC Hydro as well as public consultation – including submissions by the appellants and other Aboriginal groups, – the JRP produced a report that was made public on May 8, 2014.

[13] In its report, the JRP concluded that the project would likely have many significant adverse environmental effects, some of which could be mitigated. Specifically, with respect to Treaty 8, the JRP concluded that the Site C Project would likely cause significant adverse effects on fishing opportunities and practices, on hunting and non-tenured trapping, and on other traditional uses of the land. It found that the effects on fishing, hunting and trapping could not be mitigated, nor could some of the effects on other traditional uses of the land.

[14] As part of the Post-Panel Stage, the federal Minister of the Environment (the Minister) was required to make her EA decision within 174 days of receiving the JRP's Report, unless additional time would be required to undertake more studies or collect more information (Appeal Book Compendium, Vol. 1, Part 2, Tab E.62, p. 3360). Under the CEAA 2012 at subsection

54(2), if the Minister concludes that the project is likely to cause significant adverse environmental effects, the GIC then determines whether those effects are justified in the circumstances.

[15] Also as part of the Post-Panel Stage, a Federal/Provincial Consultation and Accommodation Report (CAR) summarized the consultation with Aboriginal groups and set out the Crown's understanding of the seriousness of the potential impact that the Site C Project could have on Aboriginal groups with a view to avoiding, mitigating or accommodating the potential impacts on Treaty 8 rights and other interests through the EA (Appeal Book Compendium, Vol. 2, Tab E.65, p. 3569).

[16] Aboriginal groups were invited to make written submissions regarding the JRP's conclusions and recommendations as set forth in its report dated May 8, 2014. In particular, they were invited to raise concerns that had not yet been addressed. Prior to the release of the CAR on September 7, 2014, they were also invited on June 10, 2014 to comment on a draft of the CAR. Aboriginal groups, including the appellants, submitted to the Minister their position that the effects of the Site C Project would result in an infringement of their rights under Treaty 8, an infringement that in their view requires justification under the *Sparrow* test (Letters dated August 19, 2014, Appeal Book Compendium, Vol. 2, Tab E.65, pp. 3720-3723).

[17] In the final CAR, the Crown disagreed with the views expressed by the appellants, in particular with the approach as stated above:

> Early in the EA Process, Treaty 8 First Nations sought to engage the Crown in consultation regarding the nature and scope of rights protected under Treaty 8. Extensive efforts were made by both the First Nations and the Crown in examining this issue and communicating views in an open transparent manner in order to focus consultations on the potential impacts of the proposed Project on the First Nations' treaty rights. The Crown does not view the EA as a process designed to determine specific rights recognized and affirmed under s. 35(1) of the *Constitution Act, 1982*, but instead, to reasonably understand the nature and extent of treaty rights potentially being impacted by contemplated Crown actions in order to assess the severity of potential impacts to them.
>
> (Appeal Book Compendium, Vol. 2, Tab E.65, p. 3572).

[18] On October 10, 2014, the Minister determined in her Decision Statement that the Site C Project was likely to cause significant adverse environmental effects referred to in subsection 5(1) of the CEAA 2012 (Appeal Book Compendium, Vol. 2, Tab E.66, pp. 3729 and 3730). The Minister, in accordance with subsection 53(1) of the CEAA 2012 established conditions – including conditions related to the use of lands and resources for traditional purposes with which BC Hydro must comply (Appeal Book Compendium, Vol. 2, Tab E.66, pp. 3731-3748). Because of the significance of the environmental effects, the Minister referred the matter to the GIC as required by subsection 52(2) of the CEAA 2012.

[19] The GIC subsequently determined that the effects associated with the Site C Project on the Peace River were justified in the circumstances, pursuant to subsection 52(4) of the CEAA 2012. As a result, the Site C Project was issued federal authorization to proceed by Order in Council 2014-1105 dated October 14, 2014:

> Whereas BC Hydro has proposed the development of the Site C. Clean Energy Project (the "Project"), near Fort St. John, British Columbia;
>
> Whereas, after having considered the Report of the Joint Review Panel – Site C Clean Energy Project and taking into account the implementation of mitigation

> measures that the Minister of the Environment considered appropriate, the Minister has decided that the Project is likely to cause significant adverse environmental effects;
>
> Whereas, after having made this decision, the Minister has, in accordance with subsection 52(2) of the *Canadian Environmental Assessment Act, 2012* ("the Act"), referred to the Governor in Council for its consideration and decision the matter of whether those effects are justified in the circumstances;
>
> Whereas the Government of Canada has undertaken a reasonable and responsive consultation process with Aboriginal groups potentially affected by the Project;
>
> Whereas the consultation process has provided the opportunity for dialogue and for the exchange of information to ensure that the concerns and interest of the Aboriginal groups have been considered in the decision-making process;
>
> Whereas the consultation process has included opportunities for the Aboriginal groups to review and comment on conditions for inclusion in a decision statement to be issued by the Minister under the Act that could mitigate environmental effects and potential impacts on the Aboriginal groups;
>
> Whereas the Minister will consider the views and information provided by the Aboriginal groups when the Minister determines the conditions to be imposed on the proponent in the decision statement;
>
> Whereas the consultation process undertaken is consistent with the honour of the Crown;
>
> And whereas the concerns and interests of Aboriginal groups have been reasonably balanced with other societal interests including social, economic, policy and the broader public interest;
>
> Therefore, His Excellency the Governor General in Council, on the recommendation of the Minister of the Environment, pursuant to subsection 52(4) of the *Canadian Environmental Assessment Act, 2012*, decides that the significant adverse environmental effects that Site C Clean Energy Project proposed by BC Hydro in British Columbia is likely to cause are justified in the circumstances.
>
> (Appeal Book Compendium, Vol. 2, Tab E.66, p. 3749).

[20] On November 5, 2014**,** the Prophet River First Nation and West Moberly First Nations (as applicants, now the appellants) brought an application for judicial review of the GIC's Order. On August 28, 2015, the Judge dismissed the application. He found that the Crown had met its

duty to consult and accommodate and that there was no requirement on the part of the GIC to determine the appellants' treaty rights and whether the Site C Project unjustifiably infringed their treaty rights under subsection 35(1) of the *Constitution Act, 1982* pursuant to the analysis set out in *Sparrow*. It is that decision that is subject of this appeal.

IV. THE JUDGE'S DECISION

[21] In rendering his decision, the Judge set forth the factual background of this case and provided an overview of the process which culminated in the decision of the GIC to approve the Site C Project. The Judge then addressed the standard of review. He determined that matters relating to procedural fairness as well as the issue of whether there is a duty to consult and the extent of that duty ought to be reviewed under the correctness standard. All other matters were to be reviewed on a reasonableness standard due to the high degree of deference owed to the GIC as an elected body acting "under legislation with which it is familiar" and because the consultation process and adequacy of consultation are questions of mixed fact and law.

[22] The Judge framed the powers of the GIC under subsection 52(4) of the CEAA 2012 as a matter of jurisdiction. He held that the GIC did not have jurisdiction under subsection 52(4) of the CEAA 2012 to decide whether the Site C Project would constitute an infringement of the appellants' treaty rights. The Judge recalled that decisions of the GIC are owed considerable deference as they are based on polycentric considerations and a balancing of a variety of interests. While recognizing that the Supreme Court of Canada made it clear that the judicial review process is a flexible one, the Judge expressed the view that it has its limits, and cannot extend to a determination that requires a developed evidentiary record. However, the Judge

acknowledged that although a final determination with respect to infringement of treaty rights requires a more robust evidentiary record, the consideration of infringement on treaty rights must still be part of the consultation process (Judge's reasons at para. 53).

[23] The Judge also found that the appellants had failed to establish a basis upon which to find that they held a legitimate expectation that treaty rights infringement would be addressed by the GIC. With respect to the duty to consult, the Judge found that the Crown's duty was met (Judge's reasons at para. 54). After noting that the appropriate degree of consultation in the present matter was at the deep end of the spectrum, he canvassed the measures undertaken by BC Hydro, the Minister and Cabinet (GIC) (Judge's reasons at paras. 62-69). Contrary to the appellants' assertion, the Judge held that the duty to consult, though extensive and broad in scope, did not extend to a final determination of treaty rights infringement. Rather, it was sufficient that treaty rights and the issue of infringement be considered. He found this to have been the case. Finally, the Judge did not explicitly address the reasonableness of the GIC's decision on a substantive basis. Rather he concluded that the GIC had reasonably considered the respondents' "good faith efforts to understand the concerns of the Applicants [appellants]" (Judge's reasons at para. 70).

V. ISSUES

[24] This appeal raises the following issues:

1. Did the Judge err in finding that the appropriate standard of review to be applied to the GIC's decision pursuant to subsection 52(4) of the CEAA 2012 is reasonableness?

2. Did the Judge err in concluding that the GIC was not required to determine the appellants' treaty rights and whether the Site C Project was an unjustified infringement of the appellants' treaty rights in making its decision pursuant to subsection 52(4) of the CEAA 2012?

3. Did the Judge err in concluding that a judicial review is not the appropriate forum to determine the appellants' treaty rights and whether they have been infringed?

VI. ANALYSIS

1. *Did the Judge err in finding that the appropriate standard of review to be applied to the GIC's decision pursuant to subsection 52(4) of the CEAA 2012 is reasonableness?*

[25] In considering the standard of review, this Court must "step into the shoes" of the Judge and decide whether he identified the appropriate standard of review and whether he applied it properly *(Agraira v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36, [2013] 2 S.C.R. 559).

[26] At this juncture, the Court recalls that the decision under judicial review was made pursuant to subsection 52(4) of the CEAA 2012 which reads as follows:

52 (4) When a matter has been referred to the Governor in Council, the Governor in Council may decide	**52 (4)** Saisi d'une question au titre du paragraphe (2), le gouverneur en conseil peut décider :
(a) that the significant adverse environmental effects that the designated project is likely to cause are justified in the circumstances; or	**a)** soit que les effets environnementaux négatifs importants sont justifiables dans les circonstances;
(b) that the significant adverse environmental effects that the designated project is likely to cause are not justified in the circumstances.	**b)** soit que ceux-ci ne sont pas justifiables dans les circonstances.

[27] The appellants submit that the Judge erred in identifying and applying the standard of review of reasonableness to a question of law concerning the GIC's jurisdiction under the CEAA 2012. The issue put before the Judge was whether the GIC was correct in deciding that it did not need to adjudicate whether its decision would infringe treaty rights. The appellants maintain that in any event, the issue before the GIC was a purely legal one given that it concerns the GIC's constitutional obligations and jurisdictional limits. To that effect, the appellants contend that the Judge erred in not reviewing the matter under the standard of correctness.

[28] It bears mentioning that in support of their position, the appellants rely on decisions rendered prior to *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190 without any reference to more recent decisions rendered by the Supreme Court in connection with the standard of review (*e.g. Smith v. Alliance Pipeline Ltd.*, 2011 SCC 7, [2011] 1 S.C.R. 160; *Celgene Corp. v. Canada (Attorney General)*, 2011 SCC 1, [2011] 1 S.C.R. 3; *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 S.C.R. 708 [*Newfoundland Nurses*]).

[29] Be that as it may, the appellants' position regarding the standard of review in the present case, framed as it is by reference to the GIC's jurisdiction under the CEAA 2012, is misguided. Indeed, as stated by the Crown, the appellants fail to properly frame the context within which the GIC renders its decisions under the CEAA 2012.

[30] The reality is that decisions rendered by the GIC are the result of a highly discretionary, policy-based and fact driven process. As such, the Judge properly found that decisions of the

GIC, an elected body familiar with its legislation, are "polycentric". Specifically, under subsection 52(4) of the CEAA 2012, the GIC's decisions are the result of an administrative process of consultation and accommodation with respect to Aboriginal rights and treaty rights. It follows that judicial review of a decision of the GIC aims to ensure that the GIC's exercise of power delegated by Parliament is reasonable and remains within the framework established by the CEAA 2012's statutory regime (*Council of the Innu of Ekuanitshit v. Canada (Attorney General*), 2014 FCA 189, [2014] F.C.J. No. 867 (QL) [*Innu of Ekuanitshit*] (leave to appeal to the Supreme Court dismissed, File No. 36136, [2014] S.C.C.A. No. 466)). Therefore, the Judge did not err in finding that the appropriate standard of review to be applied to the GIC's decision at issue is reasonableness.

2. *Did the Judge err in concluding that the GIC was not required to determine the appellants' treaty rights and whether the Site C Project was an unjustified infringement of the appellants' treaty rights in making its decision pursuant to subsection 52(4) of the CEAA 2012?*

(1) The nature and scope of Treaty 8

[31] Treaty 8 was signed in 1899 and is one of the most important post-Confederation numbered treaties. It was designed to open up the Canadian West and Northwest to settlement and development (*Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, 2005 SCC 69, [2005] 3 S.C.R. 388 at paras. 2 and 24 [*Mikisew*]). By surrendering the area where they lived, the First Nations were promised, amongst other things, the exercise of hunting, trapping and fishing rights as follows:

> And Her Majesty the Queen HEREBY AGREES with the said Indians that they shall have right to pursue their usual vocations of hunting, trapping and fishing throughout the tract surrendered as heretofore described, subject to such

> regulations as may from time to time be made by the Government of the country, acting under the authority of Her Majesty, and saving and excepting such tracts as may be required or taken up from time to time for settlement, mining, lumbering, trading or other purposes.
>
> (Report of Commissioners for Treaty No. 8, Appeal Book Compendium, Vol. 2, Tab F.1, p. 3805).

[32] The above Treaty 8 article reveals a tension (*Mikisew* at para. 33) that remains apparent to this day: on the one hand, the First Nations are confirmed in their hunting, trapping and fishing rights and, on the other, the Crown is authorized to "take up" land "from time to time" for specific and broad "purposes". Although it is established that the Treaty 8 signatories understood that land use as contemplated by Treaty 8 "signaled the advancing dawn of a period of transition" (*Mikisew* at para. 27), it remains that each "taking up" of lands by the Crown "from time to time" has the potential of exacerbating the inescapable tensions in maintaining the *quid pro quo* achieved by the treaty.

(2) The duty to consult in connection with claimed Aboriginal rights

[33] Prior to 2004 and the seminal decisions of the Supreme Court of Canada in *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 S.C.R. 511 [*Haida Nation*] and *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, 2004 SCC 74, [2004] 3. S.C.R. 550 [*Taku River*], Aboriginal peoples were required to prove their rights in the context of often time-consuming litigation. The approach at the time had been set forth in *Sparrow*: if Aboriginal peoples were successful in proving their rights as well as a *prima facie* infringement, the analysis moved to the issue of justification. At that stage, the burden was on the Crown to justify the legislative or regulatory infringement in establishing (i) a valid

legislative objective; and (ii) a legislative scheme consistent with the honour of the Crown, the special trust relationship and the responsibility of the Crown vis-à-vis Aboriginal peoples (*Sparrow*, p. 1114). Prior to 2004, the focus of Aboriginal rights was thus on the infringement of rights and the justification test when legislation or projects were challenged by Aboriginal peoples. Although *Sparrow* affirmed a duty to consult incumbent upon the Crown, it was only engaged as part of the justification test (*Sparrow*, p. 1119).

[34] However, with the *Haida Nation* and *Taku River* decisions, the Supreme Court moved away from the *Sparrow*-based infringement approach. Rather, it imposed on the Crown a duty to consult and accommodate, if necessary, in the event a project might have a significant impact on claimed Aboriginal rights:

> On this point, *Haida Nation* represented a shift in focus from *Sparrow*. Whereas the Court in *Sparrow* had been concerned about sorting out the consequences of infringement, *Haida Nation* attempted to head off such confrontations by imposing on the parties a duty to consult and (if appropriate) accommodate in circumstances where the development might have a significant impact on Aboriginal rights when and if established … (*Beckman v. Little Salmon/Carmacks First Nation*, 2010 SCC 53, [2010] S.C.J. No. 53 (QL) at para. 53 [*Beckman*]).

[35] Although *Haida Nation* does not displace the unfettered right of Aboriginal peoples to commence an action, it sets the framework for dialogue between the Crown and Aboriginals for claimed rights (prior to their proof) grounded in the central principle of the honour of the Crown. On the basis of that principle, McLachlin C.J., writing for the Supreme Court, stated that the Crown has a duty to consult with Aboriginal peoples when it "has knowledge, real or constructive, of the potential existence of the Aboriginal right or title and contemplates conduct that might adversely affect it" (*Haida Nation* at para. 35). In order to assess the extent of the

Crown's duty to consult, the Supreme Court also established a spectrum as to the content of the duty. The level of consultation and, in some cases accommodation, is to be assessed on a case-by-case basis and will vary depending on the strength of the claim made by the Aboriginal peoples.

[36] At this juncture, it is also useful to recall that pursuant to section 35 of the *Constitution Act, 1982,* Aboriginal and treaty rights are constitutionally protected rights and the strength of their protection is reflected on a spectrum. At the one end of the spectrum of section 35 rights lie claimed rights which have yet to be affirmed and recognized (*Haida Nation; Taku River*). At the other end of the spectrum lie the proven Aboriginal rights (*Tshilqot'in Nation v. British Columbia*, 2014 SCC 44, [2014] 2 S.C.R. 257 [*Tshilqot'in Nation*]*; Sparrow*). Between these claimed rights and proven rights lie treaty rights. Although treaty rights can be defined as established rights as opposed to claimed rights, and Aboriginal groups are entitled to what was confirmed in Treaty 8 *(West Moberly First Nations v. British Columbia (Chief Inspector of Mines),* 2011 BCCA 247, [2011] B.C.J. No. 942 (QL) at paras. 137-140), the scope of their use on Aboriginal peoples' traditional territories still needs to be delineated (*Mikisew* at para. 32).

(3) The duty to consult in connection with treaty rights

[37] Although the duty to consult addressed in *Haida Nation* was in relation to claimed Aboriginal rights and not treaty rights, it was observed that the honour of the Crown is also at play in connection with treaty rights:

> … Treaties serve to reconcile pre-existing Aboriginal sovereignty with assumed Crown sovereignty, and to define Aboriginal rights guaranteed by s. 35 of the *Constitution Act, 1982*. Section 35 represents a promise of "rights recognition,

> and "[i]t is always assumed that the Crown intends to fulfil its promises (*Badger*, *supra*, [*R. v. Badger*, [1996] 1 S.C.R. 771, [1996] S.C.J. No. 39 (QL)] at para. 41). This promise is realized and sovereign claims reconciled through the process of honourable negotiation. It is a corollary of s. 35 that the Crown act honourably in defining the rights it guarantees and in reconciling them with other rights and interests. This, in turn, implies a duty to consult and, if appropriate, accommodate.
>
> *(Haida Nation* at para. 20).

[38] Shortly after the *Haida Nation* decision, the Supreme Court confirmed that the duty to consult not only applied to claimed rights, but also to historical treaty rights (*Mikisew*) and modern treaty rights (*Beckman*).

[39] It is noteworthy that the *Mikisew* decision also dealt with Treaty 8 and Binnie J. stated that "the inevitable tensions underlying implementation of Treaty 8 demand a process by which the lands may be transferred from the one category (where the First Nations retain rights to hunt, fish and trap) to another category (where they do not)" (*Mikisew* at para. 33). On the basis of the findings in *Haida Nation* for claimed Aboriginal rights, he found that the content of the process is "dictated by the duty of the Crown to act honourably." (*ibid*).

[40] In *Mikisew*, the federal government had approved in 2000 the construction of a winter road but failed to consult with the Mikisew Cree in this regard. Following protest by the Mikisew Cree, the road was modified but again the Crown did not engage in consultation. The Supreme Court acknowledged that the Crown had a treaty right to "take up" surrendered lands but had to manage this taking up process honourably:

> The Crown has a treaty right to "take up" surrendered lands for regional transportation purposes, but the Crown is nevertheless under an obligation to inform itself of the impact its project will have on the exercise by the Mikisew of

> their hunting and trapping rights, and to communicate its findings to the Mikisew. The Crown must then attempt to deal with the Mikisew "in good faith, and with the intention of substantially addressing" Mikisew concerns (*Delgamuukw*, at para. 168 [*Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010]). This does not mean that whenever a government proposes to do anything in the Treaty 8 surrendered lands it must consult with all signatory First Nations, no matter how remote or unsubstantial the impact. The duty to consult is, as stated in *Haida Nation*, triggered at a low threshold, but adverse impact is a matter of degree, as is the extent of the Crown's duty. Here the impacts were clear, established and demonstrably adverse to the continued exercise of the Mikisew hunting and trapping rights over the lands in question. (*Mikisew* at para. 55).

[41] The Supreme Court further found that a duty to consult was triggered in the circumstances because the taking up would have an impact on the treaty rights of the Mikisew Cree. However, since the Crown was purporting to build a minor winter road on surrendered lands where the Mikisew Cree treaty rights were subject to a "taking up" clause in Treaty 8, the Supreme Court was of the view that the Crown's duty to consult was at the low end of the spectrum (*Mikisew* at para. 64). The Crown was thus required to provide notice to the Mikisew Cree and to engage directly with them.

[42] The Crown's duty to consult in the context of the exercise of its right to "take up" land under another post-Confederation numbered Treaty – *i.e.* Treaty 3 – was recently reiterated by the Supreme Court in *Grassy Narrows First Nation v. Ontario (Natural Resources)*, 2014 SCC 48, [2014] 2 S.C.R. 447 [*Grassy Narrows*]. Treaty 3, akin to Treaty 8 in *Mikisew*, sets out a "taking up" clause. The main question raised in *Grassy Narrows* was whether Ontario had the power to take up lands in the Keewatin area under Treaty 3 entered into with the Ojibway in 1873, so as to limit the harvesting rights under the treaty, or whether this was subject to Canada's approval because the Treaty was negotiated by the federal Crown (Canada) and not the province of Ontario.

[43] In a unanimous decision, the Supreme Court found that both Canada and Ontario as the "Crown" are responsible for fulfilling the treaty promise when acting within the division of powers under the Constitution. Ontario alone had the authority to take up lands pursuant to sections 109 (beneficial interest in lands and resources in the Province), 92(5) (power of the management and sale of the provincial lands and the timber and wood thereon) and 92A (power to make laws regarding non-renewable natural resources, forestry resources, and electrical energy) of the *Constitution Act, 1867*, (U.K.), 30 & 31 Victoria, c. 3 in accordance with the treaty and section 35 of the *Constitution Act, 1982*. In reaching this conclusion, the Supreme Court echoed its finding in *Mikisew* and repeated that, in exercising its jurisdiction over Treaty 3 lands, Ontario must do so in conformity with the honour of the Crown and its fiduciary duties when dealing with Aboriginal interests. Hence, Ontario must respect the harvesting rights of the Ojibway over the land, and its right to take up "is subject to its duty to consult and, if appropriate, accommodate First Nations' interests beforehand (*Mikisew*, at para. 56)" (*Grassy Narrows* at para. 51).

[44] In the present case, given the magnitude of the Site C Project, the Crown at the earliest stage of the EA approached consultation with the appellants from the deep end of the spectrum.

(4) The environmental assessment (EA) of the Site C Project

[45] It is recalled that the Site C Project required both a federal and a provincial EA. There was thus a joint EA process that was carried out by a JRP. The EA lasted three years. The consultation process was set up with 29 Aboriginal groups who could potentially be impacted by the Site C Project. The Aboriginal groups also provided input into the JRP's mandate in

conducting the EA. The appellants took the position in the EA process that the JRP should have the mandate to determine infringement of their treaty rights. The JRP's mandate was to receive information as to how the Site C Project "may adversely impact asserted or established Aboriginal and treaty rights" (Report of the JRP, sections 2.3 and 2.6, Appeal Book Compendium, Vol. 1, Part 2, Tab E.62, pp. 3362-3363). It did not include determining whether the Site C Project constituted an infringement of Treaty 8 rights or "any matter of treaty interpretation" (JRP Terms of Reference, Report of the JRP, sections 2.5(d) and (e), Appeal Book Compendium, Vol. 1, Part 2, Tab E.62, p. 3363).

[46] The scope of the EA process is consistent with the CEAA 2012 which includes "taking into account" "… environmental effects" (subsection 5(1) of the CEAA 2012) and Aboriginal peoples' "current use of lands and resources for traditional purposes" (subparagraph 5(1)*c*)(iii) of the CEAA 2012). As such, the EA process is an information-gathering process and not a process intended to result in a binding determination of Aboriginal or treaty rights.

[47] Upon considering the above and reviewing the evidence, the Judge found that the appellants were consulted extensively before, during and after the Panel hearings (Judge's reasons at paras. 62-70). On this basis, he concluded that the Crown had satisfied its duty to consult in the circumstances. He explained that although the issue of infringement of treaty rights "needed to be part" of the consultation process (Judge's reasons at paras. 53 and 58), no determination of treaty rights was required at this stage:

> Based on the record before me, and contrary to the assertions made by the Applicants [appellants], the Crown did not need to <u>determine</u> infringement of the Applicant's [appellants'] treaty rights; they did <u>consider</u> those rights, did not ignore the impact of the Project on those treaty rights or find that the negative

> impact could be mitigated, and did assess the cumulative effects of the prior existing two dams on the historical rights of the Applicants [appellants] (EIS Guidelines, clauses 8.5.3 and 9-1).
>
> (Judge's reasons at para. 61) [Emphasis added].

[48] It is recalled that in this appeal, the appellants have not challenged the Judge's conclusion on the adequacy of consultation (Appellants' memorandum of fact and law at para. 110). The present case therefore does not raise the issue of the appropriate level of consultation required on the part of the Crown as in other cases (*Innu of Ekuanitshit*; *Gitxaala Nation v. Canada*, 2016 FCA 187, [2016] F.C.J. No. 705 (QL) [*Gitxaala Nation*]). Rather, the central issue in the present case is whether the GIC, in exercising its authority pursuant to subsection 52(4) of the CEAA 2012, was required to determine whether treaty rights would be infringed and, if so, whether the infringement could be justified under *Sparrow*. This issue requires consideration of the consultation process that took place in the present case.

(5) The process of consultation in the context of treaty rights

[49] If the Crown undeniably has a duty to consult, Aboriginal peoples have a reciprocal duty to collaborate and provide a factual basis for the determination of their traditional territories and/or, the scope of their treaty rights. The path toward reconciliation is a give and take process and "reciprocal duties flow from one of the goals of the duty, which is to foster reconciliation through dialogue" (Sébastien Grammond, *The Terms of Coexistence – Indigenous People and Canadian Law*, (Toronto: Carswell 2013) at 287). Although a commitment to the process does not imply a necessary agreement on the outcome, the Supreme Court has stressed that "it does

require good faith efforts to understand each other's concerns and move to address them" (*Haida Nation* at para. 49).

[50] Although it is uncontested that the appellants, as signatories of Treaty 8, have treaty rights in the area covered by Treaty 8, there is no evidence that their rights cover the entire area of 840,000 square kilometres, an area that exceeds the size of the province of Manitoba (*Mikisew* at paras. 2 and 48)**.** Unless a treaty enumerates specific locations for hunting, treaty rights ascertained on a treaty wide-basis have to be specified as part of the consultation process. As such, it is insufficient for the appellants to assert treaty rights by merely alleging preferred areas without any specification with respect to the traditional land use area in which the rights were historically and are currently exercised.

[51] As part of the consultation process, the appellants therefore not only had the opportunity but the obligation to carry their end of the consultation process and provide information in support of their allegation that the Site C Project would infringe their specified treaty rights. Particularly, the appellants had the duty to provide information for the determination of their traditional territories and the scope of their treaty rights in order to demonstrate that the potential impact of the Site C Project was so severe so as to constitute infringement (*Haida Nation* at para. 48). Here, the appellants did not provide adequate information to the JRP to support their allegations.

[52] In presenting land use information, the appellants chose to do so with three other Aboriginal groups under the umbrella of the Treaty 8 Tribal Association (T8TA). The T8TA

submitted one map. A request by BC Hydro was made for the T8TA to provide a map for each T8TA First Nation. The request was refused and no map reflecting each of the four Nations forming part of the T8TA, including the appellants' traditional territory, was submitted (Affidavit of Seanna McConnell at paras. 64-65 and 72, Appeal Book, Tab. O, pp. 10351-10353). As indicated by BC Hydro, the combined territory of the T8TA map showed a territory of over 121,000 km^2 and included a text box. The wording in the textbox is apposite:

> … This does not represent the extent of the four First Nations' traditional territories or the extent of the lands over which they exercise their [sub]section 35(1) rights, both historically and presently.
>
> (Traditional Land Use Study (TLUS), Appeal Book, Tab E, p. 329).

[53] Reference is also made at this juncture to the TLUS methodology report (TLUS Report) that deals with the data collected and the method used. The TLUS Report was provided by the appellants and describes the following limitations:

> … Additional studies are necessary to fill information gaps regarding the participating First Nations' knowledge and the resources, criteria, thresholds and indicators necessary to sustain meaningful practice of Treaty 8 rights into the future. (Appeal Book Compendium, Vol. 1, Part 1, Tab E.3, p. 257).
>
> Due to constraints of time and budget, this study considers only the results of use and occupancy mapping interviews completed for the Project, and a limited number of contextual or harvest survey interviews. Other existing sources of information, including ethnographic, archival or other existing studies, were not considered in detail. Interviews lasted approximately 2-3 hours and data collected for each land user is limited to what the participant was able and willing to report in that time. … (Appeal Book Compendium, Vol. 1, Part 1, Tab E.3, pp. 257-258).
>
> All mapped values are based on the use and knowledge of the Treaty 8 members belonging to one of the four participating First Nations. Within the flood zone and footprint, 63 values (17%) were mapped as approximate locations and 32 (9%) were mapped based on second-hand knowledge. (Appeal Book Compendium, Vol. 1, Part 1, Tab E.3, p. 260).

> … No field verification of mapped interview data was conducted. (Appeal Book Compendium, Vol. 1, Part 1, Tab E.3, p. 265).
>
> … Due to time, budget and logistical constraints, the study achieved a non-random response rate ranging from approximately 7% (HRFN) [Halfway River First Nation] to approximately 11% (DRFN) [Doig River First Nation] of total registered population. As such the sample should be taken to represent the 77 participants rather than the broader populations as a whole. (Appeal Book Compendium, Vol. 1, Part 1, Tab E.3, p. 267).
>
> [Emphasis added]

[54] The lack of information supporting the appellants' assertions of their specified treaty rights was noted by the Judge at paragraph 69 of his reasons:

> … It is also apparent from the Record that while the Crown engaged with the Applicants [appellants] to address mitigation and measures to be taken after issuance of the JRP, the Applicants [appellants] refused to engage in such a dialogue once it was decided by the Applicants [appellants] that the Project not proceeding was the only viable solution for the Applicants [appellants], as the end result of the process.

[55] In addition, it appears from the CAR dated September 7, 2014 that the Prophet River First Nation exercises it Treaty 8 rights at a fair distance away from the Site C Project:

> … Recognizing that the four groups represented by T8TA during the Pre-Panel and Panel Stages of the EA have presented TLUS information without much differentiation, Prophet River First Nation appears to principally exercise hunting, trapping and fishing rights ~200 km north of the area to be directly impacted by the proposed Project.
>
> (Appeal Book Compendium, Vol. 2, Tab E.65, p. 3575).

[56] In short, the evidence on record does not demonstrate that the exercise of the Prophet River First Nation's treaty rights extends over 200 km to the Site C Project.

[57] Be that as it may, in arguing that the GIC had an obligation to determine any infringement of treaty rights in accordance with the *Sparrow* analysis, the appellants are in reality inviting the Court to revert to the pre-*Haida Nation* case law. Specifically, they contend that claimed rights or treaty rights ought to be adjudicated by the GIC every time an infringement is alleged by an Aboriginal group. As mentioned earlier, that approach proved to be complex and often resulted in years of litigation (*Tshilqot'in Nation*; *R. v. Côté,* [1996] 3 S.C.R. 139, [1996] S.C.J. No. 93 (QL); *Delgamuukw*). This is what *Haida Nation* sought to cure and in *Mikisew*, Binnie J. clearly did not accept the *Sparrow*-orientated approach adopted by the Federal Court in the context of a proposed "taking up" (*Mikisew* at paras. 53 and 59). By importing the duty to consult, the Supreme Court emphasized that negotiation is the preferred way of reconciling Aboriginal interests with those of the Crown. The approach advocated by the appellants in the present case, if accepted, would thus considerably weaken the application of the duty to consult and re-introduce the *Sparrow*-oriented approach to treaty rights at the early stage of claimed rights. There is no justification for such a reversal.

[58] However, the right of the Crown to "take up" land is not absolute and Aboriginal peoples are not left without a remedy.

[59] In *Badger*, applying the principle of treaty interpretation and referring to the evidence for an understanding of the Treaty 8 "taking up clause", the Supreme Court found that Aboriginal peoples understood Treaty 8 as a promise that they would continue to exercise their harvesting rights:

> 57 … The Indians understood that land would be taken up for homesteads, farming, prospecting and mining and that they would not be able to hunt in these areas or to shoot at the settlers' farm animals or buildings. No doubt the Indians believed that most of the Treaty No. 8 land would remain unoccupied and so would be available to them for hunting, fishing and trapping. …

[60] It is also significant that in the event a "taking up" renders a treaty right "meaningless", an action for treaty infringement remains open. In *Grassy Narrows* at paragraph 52, the Supreme Court, building on *Badger* and making reference to *Mikisew*, stated as follows:

> Where a province intends to take up lands for the purposes of a project within its jurisdiction, the Crown must inform itself of the impact the project will have on the exercise by the Ojibway of their rights to hunt, fish and trap, and communicate its findings to them. It must then deal with the Ojibway in good faith, and with the intention of substantially addressing their concerns (*Mikisew* at para. 55; *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010, at para. 168). The adverse impact of the Crown's project (and the extent of the duty to consult and accommodate) is a matter of degree, but consultation cannot exclude accommodation at the outset. Not every taking up will constitute an infringement of the harvesting rights set out in Treaty 3. This said, if the taking up leaves the Ojibway with no meaningful right to hunt, fish or trap in relation to the territories over which they traditionally hunted, fished, and trapped, a potential action for treaty infringement will arise
>
> (*Mikisew* at para. 48). [Emphasis added]

[61] Finally, while *Mikisew* and *Grassy Narrows* clarify the duty of the Crown in "taking up" land "from time to time" they leave unresolved the issue of cumulative effects of the exercise of "taking up" by the Crown leading to a *de facto* extinguishment. This issue need not be decided in this appeal but needless to say that the answer lies in the expectation that the Crown will always honourably manage the "taking up" of land from "time to time" (*Mikisew* at para. 31) and work with Aboriginal peoples in a spirit of reconciliation to consider the cumulative effects of projects in the consultation process.

(6) Conclusion regarding the GIC acting under the CEAA 2012

[62] The GIC made its Order pursuant to subsection 52(4) of the CEAA 2012. As mentioned earlier, the appellants submit that subsection 52(4) of the CEAA 2012 does not prevent the GIC from making a determination on the infringement of the appellants' treaty rights and apply the *Sparrow* analysis.

[63] The appellants do not challenge the constitutionality of subsection 52(4) of the CEAA 2012. They do not argue that subsection 52(4) of the CEAA is unconstitutional because it does not specify that the GIC must determine the infringement issue and that, as a result, this Court must invalidate the GIC's decision. Rather, the appellants assert that the CEAA 2012 does not prevent the GIC from determining the infringement of treaty rights and its justification as per *Sparrow*.

[64] An overview of relevant provisions of the CEAA 2012, assessing the GIC's functions in the context of making its decision pursuant to subsection 52(4) of the CEAA 2102, is therefore apt at this stage. More particularly, does the statute allow or compel the GIC to make the determination sought by the appellants?

[65] The core provisions of the CEAA 2012 focus on the environmental assessment of designated projects, including the possibility pursuant to section 38, of allowing the Minister to refer an environmental assessment to a review panel. Section 40 allows the Minister to enter into an agreement with another jurisdiction – *e.g.* a province – to jointly establish the review panel.

Once a report with respect to the environmental assessment of a designated project by a review panel is delivered, subsection 47(1) provides that "[t]he Minister, after taking into account the review panel's report with respect to the environmental assessment, must make a decision under subsection 52(1).".

[66] Pursuant to subsection 52(1) the Minister, as a decision-maker, "must decide if, taking into account the implementation of any mitigation measures that [he or she] considerers appropriate, the designated project … is likely to cause significant adverse environmental effects". If the Minister decides that the designated project is likely to cause significant adverse environmental effects, that decision must be referred to the GIC, as was the case here. Pursuant to subsection 52(4), when the matter is referred to the GIC, it may decide whether the significant adverse environmental effects that the designated project is likely to cause are justified or not justified in the circumstances. Subsection 52(4) reads as follows:

52 (4) When a matter has been referred to the Governor in Council, the Governor in Council may decide	**52 (4)** Saisi d'une question au titre du paragraphe (2), le gouverneur en conseil peut décider :
(a) that the significant adverse environmental effects that the designated project is likely to cause are justified in the circumstances; or	**a)** soit que les effets environnementaux négatifs importants sont justifiables dans les circonstances;
(b) that the significant adverse environmental effects that the designated project is likely to cause are not justified in the circumstances.	**b)** soit que ceux-ci ne sont pas justifiables dans les circonstances.

[67] If the GIC finds that the significant adverse environmental effects are justified under subsection 52(4), the Minister "must establish the conditions in relation to the environmental effects referred to in that subsection with which the proponent of the designated project must comply" (section 53 of the CEAA 2012).

[68] With this framework of the CEAA 2012 in mind, it is noted that the Supreme Court in *Paul v. British Columbia (Forest Appeal Commission)*, 2003 SCC 55, [2003] 2 S.C.R. 585 at paragraph 39, provided some insight on how it can be determined whether or not a statutory decision-maker such as the GIC under the CEAA 2012 has the authority to decide question of law such as the infringement of treaty rights:

> The essential question is whether the empowering legislation implicitly or explicitly grants to the tribunal the jurisdiction to interpret or decide any question of law. If it does, the tribunal will be presumed to have the concomitant jurisdiction to interpret or decide that question in light of s. 35 or any other relevant constitutional provision. Practical considerations will generally not suffice to rebut the presumption that arises from authority to decide questions of law. This is not to say, however, that practical considerations cannot be taken into consideration in determining what is the most appropriate way of handling a particular dispute where more than one option is available.

[69] In the present case, subsection 52(4) of the CEAA 2012 cannot be read as conferring upon the GIC, either expressly on implicitly, the power to determine infringement of treaty rights.

[70] Indeed, subsection 52(4) does not reflect an intention on the part of Parliament to convert the GIC into an adjudicative body. The reality is that the GIC lacks the necessary hallmarks

associated with adjudicative bodies: public hearings, ability to summon witnesses and compel production of documents and the receipt of submissions by interested parties.

[71] The GIC as a decision-maker is not adjudicative in nature but focuses rather on a variety of considerations – often referred to as polycentric – and thereby seeks to balance a variety of interests (*Innu of Ekuanitshit* at para. 73). Courts have recognized that the GIC is a body concerned with both fact and policy (*Canadian National Railway Co. v. Canada (Attorney General)*, 2014 SCC 40, [2014] S.C.R. 135 at para. 48) and the Judge likewise observed same at paragraph 46 of his reasons:

> … the GIC … exercises its discretion to decide on a different platform, based on polycentric considerations and a balancing of individual and public interests, including Aboriginal interests and concerns. …

[72] The fact that the GIC does not possess any expertise and is not equipped to determine contested questions of law and complex factual issues also illustrates that it cannot exercise adjudicative functions. *A fortiori*, determining whether a section 35 treaty right infringement is justified pursuant to the *Sparrow* analysis is not within the realm of the GIC. To conclude otherwise flies in the face of the CEAA 2012 statutory scheme.

[73] In support of their position, the appellants also rely on *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038, [1989] 1 S.C.J. No. 45 (QL) [*Slaight Communications*]. They contend that in order to exercise the power conferred by subsection 52(4) of the CEAA 2012 within the parameters of the Constitution, more particularly section 35, the GIC must determine the infringement issue and perform the requisite *Sparrow* analysis. Yet, the parallel the

appellants attempt to draw is misplaced given that *Slaight Communications* was decided in the context of the *Canadian Charter of Rights and Freedoms*, (Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11) [Charter] and the section 1 framework as developed in *R. v. Oakes*, [1986] 1 S.C.R. 103, [1986] S.C.J. No. 7 (QL). As explained earlier, the case at bar is governed by the *Haida Nation/Mikisew* section 35 specific consultation and accommodation process crafted by the Supreme Court for the purposes of addressing claimed Aboriginal rights, treaty rights and achieving reconciliation.

[74] It follows that the Judge did not err in finding that the GIC is not empowered to adjudicate rights and determine whether there is an unjustified infringement of the appellants' treaty rights when it is called upon to decide if the significant environmental effects that the designated project is likely to cause are justified pursuant to section 52 of CEAA. Although the appellants do not challenge the consultation process, they contend that consultation in and of itself was not sufficient. In the absence of a challenge to the consultation process by the appellants in order to invalidate the GIC decision, it is difficult for this Court, in the circumstance, to find that the GIC decision is not reasonable. Indeed, throughout the EA, Aboriginal interests – whether they are asserted or established Aboriginal rights or Treaty 8 rights and other interests – were considered both in assessing the potential impact of the Site C Project and seeking measures of accommodation (CAR, Appeal Book Compendium, Vol. 2, Tab E.65, p. 3631).

[75] Furthermore, in the GIC's decision itself, six (6) paragraphs out of eleven (11) relate to Aboriginal groups, evidencing the fact that the GIC turned its mind to whether the Crown's duty

to consult had been met and whether the Aboriginal interests and concerns had been considered. Specifically, the GIC's Order states that (i) the consultation process was undertaken by the Government of Canada; (ii) the consultation process provided the opportunity for dialogue and an exchange of information to ensure that the concerns and interest of the Aboriginal groups were considered; (iii) opportunities for the Aboriginal groups to review and comment were provided; (iv) the Minister would consider the views and information of Aboriginal groups in determining the conditions to be imposed on the proponent; (v) the consultation process undertaken was consistent with the honour of the Crown; and (vi) the concerns of Aboriginal groups were balanced with other societal interests.

[76] On the basis of the Record before this Court, specifically the information obtained through the EA process, the evidence provided by the appellants, the consideration of asserted or established Aboriginal rights, *i.e.* Treaty 8 rights and other interests throughout the consultation process, as well as the GIC's statutory powers under subsection 52(4) of the CEAA 2102, the GIC's decision cannot be found to have been unreasonable.

3. *Did the Judge err in concluding that a judicial review is not the appropriate forum to determine the appellants' treaty rights and whether they have been infringed?*

[77] Finally, the appellants submit that the Judge made an error in finding that judicial review is not the appropriate forum to determine if Treaty 8 rights were infringed and that an action would be the more appropriate course to determine the issue of infringement of the appellants' treaty rights (Judge's reasons at para. 53). The appellants' contention in this regard also fails.

[78] A judicial review is a summary proceeding and, generally, the only material that is considered by the Court is the material that was before the decision-maker. In the present case, for purposes of addressing the issue of whether the Site C Project infringes the appellants' treaty rights, a full discovery, examination of expert evidence, as well as historical testimonial and documentary evidence would be necessary and cannot be provided through an application for judicial review. Judicial review is not the proper forum to determine whether the appellants' rights are unjustifiably infringed. But more importantly, to contend otherwise ignores the jurisdiction of the province of British Columbia and its role in the environmental assessment process. Since the province of British Columbia is purporting to take up land under Treaty 8, it would necessarily have to be a party to the proceedings (*Grassy Narrows*).

[79] The appellants also make reference to *Beckman* in order to support their contention, but again this case is of no assistance. More particularly, *Beckman* raised questions about the interpretation and implementation of modern comprehensive land claims treaties between the Crown and First Nations, namely the *Little Salmon/Carmacks First Nation Final Agreement* (LSCFN Treaty). In its decision, the Supreme Court observed that judicial review is a flexible process and thus "perfectly capable of taking into account the constitutional dimension of the rights asserted by the First Nation" (para. 47). However, this statement cannot be read as implying that treaty rights can be adjudicated and infringement determined in the context of a judicial review.

[80] *Beckman* dealt with the consultation provisions in the LSCFN Treaty and whether the honour of the Crown and the duty to consult had been breached. However, questions of

Aboriginal and treaty rights and the issue of whether these rights have been infringed require full discovery, the examination of a myriad of expert evidence in the field of ethnography, genealogy, linguistics, anthropology, geography, as well as oral history and historical documentary evidence (*Tshilqot'in Nation; Delgamuukw)*. It is not uncommon for a trial related to section 35 rights to exceed 300 days of evidence and argument (*ibid.*). Clearly, an application for judicial review is not typically the best forum for this kind of resolution.

[81] The appellants add that they would be precluded from pursuing an action for treaty right infringement in parallel to the GIC's decision because it would constitute a form of "collateral attack". Again, this contention fails. At this stage, no decision or determination has been made with respect to the appellants' treaty rights.

[82] It follows that the Judge correctly identified reasonableness as the standard of review and applied it properly in the circumstances. The intervention of this Court is not warranted.

VII. CONCLUSION

[83] For all of these reasons, I propose to dismiss the appeal with costs.

"Richard Boivin"

J.A.

"I agree
Johanne Trudel J.A."

"I agree
Yves de Montigny J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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